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Supreme Court of the United States.

OCTOBER TERM, 1964.

No. 1001.

FREDERICK MOYNIHAN, PETITIONER,

v.

NEW YORK CENTRAL RAILROAD COMPANY,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I. Counter-Statement of the Case.

1. District Court Proceedings.

The petition involves, not an action under the Federal Employers Liability Act, but a common-law action in tort for negligence commenced by the petitioner in the Superior Court of Massachusetts in February of 1963 (R.A. 6-8). In his declaration the petitioner alleged that he sustained personal injuries as a result of the negligence of the respondent railroad and the Nacirema Operating Co., Inc. (R.A. 8-9). Based upon the diversity of citizenship of the parties, the action was removed by the respondent to the Federal District Court for the District of Massachusetts (R.A. 1, 3-6). Thereafter, on petitioner's motion, the United States Lines Co., Inc., on September 17, 1963, was added as a third-party defendant (R.A. 1, 11).

The case was transferred for jury trial to Judge William T. McCarthy (retired, by designation) (R.A. 1). The

trial began on February 6, 1964, and continued through February 11, 1964, at which time it adjourned, by agreement of the parties, because of the temporary physical incapacity of the trial judge (R.A. 1-3, 197). Trial got underway again on March 3, 1964, and finally concluded on March 12, 1964, when the jury returned a verdict for the petitioner (R.A. 3, 213). Prior to submission of the case to the jury, the respondent's motion for directed verdict had been denied (R.A. 2, 15). Motions for directed verdicts filed by United States Lines and Nacirema were allowed by the Court (R.A. 19).

2. Additional Facts.

Although the statement set forth in the petition does describe the factual background of the case in a general way, there are certain additional facts which the respondent feels should be brought to the Court's attention for a full and fair analysis of the petition.

The respondent was the lessee of Pier 3, the site of the petitioner's accident (R.A. 108, 137, 153). This pier is in the nature of an enclosed dwelling (R.A. 217), and is divided into sections by walls and bulkheads (R.A. 51, 125). When the plaintiff was injured on November 28, 1962, he was working in one of the sections on the west side of the pier as an employee of Dyke Shute, a firm which from time to time operated on the pier but which did not have any contractual relationship with the respondent (R.A. 119, 120, 122, 143). The particular section in which the accident occurred was approximately 100 feet wide and 200 feet long (R.A. 52). The petitioner, having worked on Pier 3 and the waterfront in general for many years, was very familiar with the area (R.A. 22-23, 29).

On the morning in question, Shute told the petitioner and two other employees to move certain drums, which were to be sampled, from Section 3 of the pier to Section

2 (R.A. 60, 125). Although Section 2 was large and there was nothing to prevent the men from setting the drums anywhere in the section (R.A. 67), they positioned the drums within close proximity to two skids which were resting on edge, leaning back against the bulkhead wall which divided Section 2 (R.A. 59, 61, 67, 68, 124). The drums were set out between 8 a.m. and 9 a.m. that morning. The skids had been in that position for at least two days (R.A. 125).

The plaintiff and his two fellow employees began the work of taking samples from the drums[1] without taking any precautionary measures as to the skids (R.A. 42, 61, 68-69). Later, at approximately 10 a.m., while the plaintiff was working around one of the barrels near the skids, the skids suddenly fell over, injuring the petitioner (R.A. 25, 36, 41-42). Neither the petitioner nor the two other workers who were working with him at the time of the accident could say what caused the skids to fall from the position they had been in for at least two days.

3. Appeal.

After judgment was entered upon the verdict, the respondent seasonably took appeal to the Court of Appeals (R.A. 21-22). The respondent contended on appeal that the trial Court erred in denying its motion for directed verdict because the petitioner's own evidence showed that (1) he was merely a licensee to whom the respondent owed only the duty to refrain from wilful, wanton or reckless

[1] In weighing the barrels the petitioner used the chain fall hoist. This is a steel frame with two legs from each end, about 15 feet high and 4 feet long. The legs were on wheels and the chain falls from the center of the crossbeam. It takes two men to push the hoist from one place to another. The hoist is used to lift a drum high enough to empty its contents into an empty drum in order to get a proper sample (R.A. 33, 34-35, 39).

misconduct, and there was no evidence of a breach of such duty; or (2), even if the plaintiff was a business invitee, there still was no evidence that the respondent breached the duty it owed to him in such capacity. In addition, the respondent also contended in the Court below that the trial judge committed numerous prejudicial errors in his charge to the jury and in his conduct during the course of the trial.

After the questions were fully briefed and argued, the Court of Appeals on November 20, 1964, rendered a unanimous decision setting aside the verdict and ordering entry of judgment for the defendant (Opinion, Pet. 19; reported at 338 F. 2d 644). In reaching this result the Court did not pass upon the question of whether, on the evidence, the plaintiff would have had to be considered a licensee, but held that, even assuming in the petitioner's favor that he was a business invitee, there still was not sufficient evidence to warrant the submission of the case to the jury (Opinion, Pet. 15-16). The Court, of course, also did not reach the questions raised regarding the trial Court's instructions and conduct.

A petition for rehearing was filed by the petitioner on December 3, 1964, and the Court denied the petition without opinion on December 22, 1964.

II. Questions Raised by Petition.

1. Whether the Court of Appeals may apply substantive law which is in direct conflict with applicable State law.

2. Whether a Court of Appeals may disregard jury findings supported by evidence, thereby violating the Seventh Amendment.

The respondent submits that the questions advanced in this petition, as recited above, are neither accurate nor appropriately framed. The real question raised by the petition is as follows: Will this Court grant a writ of cer-

tiorari to review the question of whether, on the record, the evidence was sufficient for the case to go to the jury where the Court of Appeals, fulfilling its proper function, has ruled, after careful review, that the evidence was not sufficient? Regardless of the wording used by the petitioner's attorneys, *this* is the question reflected in the petition. Although the respondent will make its arguments below within the framework of the questions which the petitioner has conjured, the respondent trusts that the Court recognizes the real question behind the petition and will review the arguments accordingly.

III. Reasons for Denying Writ.

1. THE SUBSTANTIVE LAW WHICH THE COURT OF APPEALS APPLIED HERE WAS NOT IN CONFLICT WITH THE APPLICABLE STATE LAW, AND, MOREOVER, WAS FULLY IN ACCORD WITH THAT LAW.

The first question which the petitioner strives to raise as a ground for review in this Court is based upon the assumption that the Court of Appeals, in arriving at its decision, applied substantive law which was directly contrary to applicable State law. Petitioner's attorneys would like to leave the impression that the Court of Appeals, and more particularly Judge Bailey Aldrich, who wrote the Opinion,[2] totally ignored the applicable Massachusetts de-

[2] Judge Bailey Aldrich's direct experience with Massachusetts law surely cannot be questioned. He was admitted to the Massachusetts Bar in 1932 and practiced from 1932 until 1954 as a trial lawyer with the well-known firm of Choate, Hall & Stewart in Boston. He was first appointed to the bench as a District Court Judge for the District of Massachusetts in 1954, and for the last six years he has sat on the Court of Appeals. The respective judicial backgrounds of Judge Edward W. Day and Judge John P. Hartigan, both of whom joined in the Opinion written by Judge Aldrich, are even more extensive.

cisions[3] which, it is agreed, were controlling as to the substantive law to be applied here (Pet. 9-11).

Even a hasty reading of the Opinion shows clearly that the Court below carefully reviewed all relevant Massachusetts decisions and, only after such careful review, concluded that, based upon the tests and standards set forth in those decisions, the petitioner had not established a case against the respondent under Massachusetts law.[4] The Court evaluated the duty imposed upon a landowner in Massachusetts, and the many refinements and exceptions which have built up around that duty over the years, by citing its reliance (on just one page of its Opinion) upon ten current Massachusetts decisions (Pet. 16; 338 F. 2d 644, 646).

It is noteworthy that the petitioner's attorneys, in contending here that the Court below ignored Massachusetts law, cite three of the cases which they relied upon in the brief they filed in the Court of Appeals.[5] These three cases represent a type of exception to the general standard which the Massachusetts Courts customarily follow. The Court of Appeals, however, was more than passively aware of the exception reflected in these three cases. The Court explic-

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[3] It should be noted, however, that petitioner's attorneys, when first stung by the reversal, levelled even stronger charges against the Court below, stating in their petition for rehearing that the Court of Appeals did not "have the grace to cope with and answer the major argument of the plaintiff"; that it had reached "a new low in deviation in tort law"; and that "no other Circuit Court in the country would nullify this verdict" (Pet. for Reh. 3, 5, 6).

[4] It is noted that the Court below also recognised that the trial judge did not correctly construe the standard of duty which is owed to a business invitee in Massachusetts (Opinion, Pet. 16).

[5] *Barrett* v. *Builders' Patent Scaffolding Co., Inc.*, 311 Mass. 41; *Hayes* v. *Boston Fish Market Corp.*, 319 Mass. 556; and *Lajeunesse* v. *Tichon's Fish & Fillet Corp.*, 328 Mass. 528.

itly referred to the "exception" in its Opinion, and in doing so, moreover, cited the *Hayes* case, upon which the petitioner now relies.

The Court pointed out that in Massachusetts a landowner is not liable to a business invitee if the invitee had knowledge of the hazard which caused his injuries, but in certain cases the landowner may not escape liability even though the invitee had knowledge of the danger if it could be found that he was reasonable in incurring the risk by confining himself to the area of the danger (Opinion, Pet. 16). As the Court below recognized, the plaintiff, having knowledge of the skids, could not rely on this exception, because it could not have been found on the evidence that he was in any way confined, in the work he was doing, to the area of the danger. This obviously was the key to the Court's decision (see footnote 2 of Opinion, Pet. 15). It was the petitioner and his two fellow employees who moved the drums into the section and put them into position. They could have put them anywhere within the section (encompassing an area of approximately 20,000 square feet).

It seems clear that the point which the petitioner's attorneys strive to raise in seeking a review by this Court under the guise of an alleged conflict between applicable State law and the law applied by the Court of Appeals is based upon a totally unwarranted assumption. It may be said that the Supreme Judicial Court of Massachusetts has, over the years, strictly limited the liability running to business invitees.[6] The development of these standards involves policy considerations which, of course, the Federal Courts cannot review. The refinements of those standards,

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[6] See, for example, *Rego* v. *Sagamore Manufacturing Co.*, 305 Mass. 346, and *Vance* v. *Wayside Inn, Inc.*, 335 Mass. 617. The plaintiffs in those two cases must have felt the strictness of the standards in Massachusetts far more than the petitioner is justified in complaining of here.

in some instances, may appear at first glance to be somewhat complicated in application, but this should not be twisted so as to make it appear that the Court below did not apply the law correctly in this case. On the contrary, it seems obvious that the petitioner's attorneys, having suffered reversal as a result of the true application of Massachusetts law, would like, in this isolated case, either to have intricacies of the substantive law of Massachusetts ignored or to have that law revised.

2. THE DIRECTION OF JUDGMENT FOR THE RESPONDENT WOULD NOT BE IN VIOLATION OF THE PETITIONER'S RIGHT TO A TRIAL BY JURY.

Before a case goes to the jury, the Court has a *duty* to determine whether the evidence is sufficient to warrant a recovery for the plaintiff, and, if the evidence does not warrant a recovery, the Court has the further duty to direct a verdict for the defendant. And it has long been recognized that, when the Court discharges this duty and directs a verdict for the defendant, the plaintiff cannot say that such action is in violation of his constitutional right to trial by jury under the Seventh Amendment. *Coughran* v. *Bigelow*, 164 U.S. 301, 308. *Treat Manufacturing Co.* v. *Standard Steel & Iron Co.*, 157 U.S. 674, 675. *Galloway* v. *United States*, 319 U.S. 372. *Smith* v. *Reinauer Oil Transport, Inc.*, 256 F. 2d 646, 649 (1st Cir., 1958).

Here the trial Court had obviously followed inaccurate legal standards in denying the respondent's motion for a directed verdict. In such a situation, when the appellate Court concludes, after reviewing the record, that the petitioner did not have a case which entitled him to go to the jury based upon correct standards of law, it becomes the duty of that Court to reverse the judgment and enter judgment for the defendant. The crucial question, therefore,

is again whether the Court of Appeals properly construed and applied the applicable substance of law of Massachusetts. Although the argument above related to the same question in another context, the respondent submits that those arguments also establish that the Court below was correct in concluding that the judgment should be reversed and entered for the respondent because the petitioner did not present a case which entitled him to go to the jury.

3. THE QUESTIONS RAISED BY THE PETITIONER ARE NOT SUCH AS ENTITLE HIM TO THE PRIVILEGE OF A REVIEW IN THIS COURT.

As mentioned above, the questions recited in the petition, when stripped of the assumptions which mask their true identity, actually turn out to be a mere request by the petitioner to have this Court review the legal sufficiency of the evidence presented in a common-law action which by no stretch of the imagination would have significance beyond this particular litigation.

In attempting to comply with Supreme Court Rule 19, which requires that there be "special and important reasons" for granting a review on a writ of certiorari, the petitioner's attorneys have raised the argument that the law applied by the Court of Appeals was in direct conflict with applicable State law. As can be seen from a reading of the Opinion, there is no conflict whatsoever between controlling law and the law applied. Any "conflict" here exists only in the minds of the petitioner's attorneys. In order to be entitled to a review there should be a real conflict between the controlling law and the applied law which is clearly and unquestionably reflected in the petition.[7]

[7] See, for example, *Herron* v. *Southern Pacific Co.*, 283 U.S. 91, where the Federal District Court, in a personal-injury action based upon diversity of citizenship, refused to follow the State law requiring the submission of all questions relating to contributory negligence to the jury.

Even if the petitioner could say there was even some slight conflict here, which he cannot, the question still would not, as the petitioner's attorneys would like to contend, be of "great and demanding importance" (Pet. 12). It borders on the absurd to argue, as petitioner's attorneys do, that, if review is not granted here and the judgment below reversed, the United States Courts will become "a haven for denial of jury trial" and the "normal pattern of removal from state courts to Federal courts will be seriously distorted" (Pet. 12). Certainly, if review were to be granted in this case and judgment reversed, the substantive law of Massachusetts would not be changed at all thereby. And it would be totally unrealistic to think that such action would deter defendants in future cases from securing removal to Federal Courts in order that they may take advantage of the methods of full discovery and the other many efficient procedures which are available in the Federal Courts and which are frequently missing in most State Courts.

If any pattern is in danger of being altered and distorted, it is the normal pattern of appellate review in the Federal Courts if review is granted here on what can only be construed as a routine question of the sufficiency of the evidence in a personal-injury action which is in the Federal Court because of the diversity of citizenship of the parties. The Federal Courts of Appeals were originally created under the Judicial Act of 1891 to fulfill this particular function of review in order to relieve the Supreme Court of the heavy burden of that function. This Court, over the years, has carefully refrained, and properly so, from reviewing routine questions involving the sufficiency of evidence except where there are attendant thereto unusual questions giving rise to unique and important policy considerations. No such unusual questions exist here.

This Court is faced with an increasing number of cases involving truly important questions in such areas as civil rights, separation of church and state, freedom of speech, and the constitutional rights of defendants in criminal cases in both Federal and State Courts, to name but a few areas, all of which involve, in varying degrees, significant policy considerations which are national in scope and which frequently affect every citizen in the Country in some way. With all the truly important cases seeking review in this Court, it would seem that the petitioner's attorneys have permitted their disappointment to becloud their thinking when they say that the question here involves issues of "great and demanding importance."

IV. Conclusion.

For the reasons stated above, the respondent submits respectfully that the petition for writ of certiorari filed by the petitioner should be denied.

Respectfully submitted,

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